2-6-2014

Marmor v. Marmor Appellant's Reply Brief Dckt. 41062

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFF MARMOR,

Plaintiff-Appellant,

vs.

PATRICIA MARMOR,

Defendant-Respondent.

SUPREME COURT NO. 41062-2013

APPELLANT'S REPLY BRIEF

Appealed from the District Court of the Fourth Judicial District of the State of Idaho,

In and For the County of Ada

The Honorable Ronald J. Wilper, District Judge Presiding

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I. THE RESPONDENT ERRONEOUSLY ATTEMPTS TO EQUATE THE PURPOSE OF THE DIVORCE DECREE WITH THE ACTUAL TERMS

In this action, it is the Respondent who is torturing the words of the Mr. Marmor's *Complaint* in order make it appear like this was an enforcement of the terms of the decree. However, the Respondent's argument fails for either of two simple reasons.

First, the Respondent only speaks in generalities, because she cannot identify a specific term in the decree that was being enforced in this action. This stipulated decree is a decree for divorce, and divorce decrees by definition have a singular purpose; to see that the parties and their property are divided and separated. Mr. Marmor's purpose in filing this action was simply this: to get his name off the title of the Scops Owl property. This is also the undisputed the intent of the stipulated decree.

So, Mr. Marmor's intent in bringing this action and the intent behind the decree are in harmony with one another. But this does not mean that Mr. Marmor was "enforcing the terms" of the decree. Indeed, terms of the decree give the Respondent 180 days to make a good faith effort to refinance, but the terms are unequivocally silent concerning what should happen after 180 days. *CR. Vol. I, p. 56, L. 4-20.* Because Mr. Marmor is requesting a partition of the property well outside of the 180-day window, he cannot possibly be said to be enforcing any specific term in the decree. Actually, he was enforcing his property rights and in the proper venue, District Court.

Second, the Respondent's argument gives no weight to the term "Husband's name shall remain on title until the refinance in complete." The Respondent cannot explain what possible purpose there is to this term, because its purpose destroys their argument. Mr. Marmor obviously wasn't seeking to "enforce" this term, because his name was already on the title to the Scops Owl property. The Respondent seemingly believes that this term carries no weight and allows her to keep her ex-husband captive on the mortgage until she sees fit to release him.

As was very clearly stated in the *Complaint* ¶ 10, Mr. Marmor was seeking to enforce his property rights under Idaho Code § 6-501. *CR. Vol. I, p. 7, L. 8.* Mr. Marmor can enforce property rights without enforcing the decree, because Mr. Marmor's name is on the title and there

is no term in the decree prohibiting him from doing this. So, although the Respondent's counsel cleverly attempts to argue that Mr. Marmor must be enforcing the terms of the decree because his purpose is to effect a refinance or sale, it is clear that Mr. Marmor was not enforcing any specific term in the decree by enforcing his rights in the property.

When reading these briefs, the key question that must be answered is:

**** **Is there a term in the decree that governs the disposition of the Scops Owl Property after the 180-day window has passed?** If there is a term that governs the disposition of the property after the 180-day window, then the Respondent has successfully defended the appeal of this issue. However, if the Court cannot identify any such term, then Mr. Marmor cannot possibly have been "enforcing" a term. And if Mr. Marmor was not enforcing any term, then the attorney fee clause in the decree cannot operate against him. If the attorney fee clause cannot operate against him, then this Court must reverse the District Court.

In her brief, the Respondent could not identify a specific term that was being enforced in the underlying action. As a result, her argument fails.

II. MR. MARMOR DOES NOT DISPUTE THE ALLOWANCE OF SUPPLEMENTAL COSTS BILLS; HE DISPUTES THE TIMELINESS OF THEM

As the record shows, the Respondent incurred attorney fees in defense of a motion to disallow costs that resulted in a judgment against Mr. Marmor. *AR. Ex. K.* This judgment was entered on April 25, 2013. *CR. Vol. I, p. 140-1.* However, the Respondent did not submit these costs via supplemental memorandum until June 6, 2013. *AR. Ex. K.*

The Respondent offers an argument that can best be described as a strawman stuffed with red herrings. The Respondent argues that Mr. Marmor is failing to mention that supplemental cost bills are allowed under *Lettunich v. Lettunich*, 145 Idaho 746 (2008). However, Mr. Marmor is not even trying to argue against allowing supplemental costs bills, which is the thrust of *Lettunich*. In fact, the Respondent's argument is simply a distraction designed to pull the Court's

attention away from the real issue; the timeliness of the submission of these costs. Indeed, *Lettunich* does not even touch on the issue of timeliness and therefore is not relevant to this case.

The Respondent goes on to try to literally redefine the word "judgment" given in I.R.C.P. 54(a). A judgment "***as used in these rules*** means ***a*** separate document entitled "Judgment" or "Decree". I.R.C.P. 54(a) (emphasis added). The Respondent goes on to try to alter the meaning of "judgment" by using *Neighbors For Responsible Growth v. Kootenai County* to say that a judgment is a "final" singular event. And from here the Respondent argues that she cannot possibly submit supplemental memoranda within the 14-day window because most all of their post-judgment fees will be incurred after 14 days have passed since "final" judgment.

On the surface the Respondent's argument looks tempting, however, the text of I.R.C.P. 54(d)(5) never says that the entry of judgment was the final, singular event at the end of a case. I.R.C.P. 54(d)(5) doesn't use the word "final" at all. In fact, the language in I.R.C.P. 54(d)(5) very clearly leaves open the possibility of multiple "decisions" and "judgments."

I.R.C.P. 54(d)(5) could have used the words "***the*** decision of the court" but instead used the words "***a*** decision of the court." Thus, if such a decision of the court leads to an "entry of judgment", the prevailing party has 14 days to submit their memorandum of costs, or they waive their rights. Indeed, I.R.C.P. 54(a) does not say "***the*** separate document." Rather, it defines "judgment" as "***a*** separate document entitled 'Judgment' or 'Decree'" (emphasis added). So the definition of judgment itself shows that there can be multiple judgments, not a singular event.

The timeline in this case is clear. The District Court made a decision on April 22 and entered a corresponding judgment on April 25. As a response to the filing of a notice of appeal, the Respondent filed her memorandum of costs on June 6, outside the 14-day limit. The plain text of I.R.C.P. 54 bars any recovery for the costs incurred prior to April 25.

III. THE ATTORNEY FEE CLAUSE OF THE DIVORCE DECREE IS A TERM, AND IT IS THE RESPONDENT WHO IS ENFORCING IT AGAINST MR. MARMOR

The Respondent's "heads I win, tails you lose" argument completely ignores the circumstances that have led to this appeal. Mr. Marmor is not appealing the result of the underlying case. Mr. Marmor is appealing the erroneous award of attorney fees by the District

Court. This award of attorney fees was made pursuant to a clause in the decree.

It is the Respondent who made requests for fees pursuant to the attorney fee clause in the divorce decree. If the Court agrees, as shown above, that Mr. Marmor was not enforcing any term in the decree, then the Court must also agree that it is only the Respondent who is enforcing a term in the decree by using the attorney fee clause against Mr. Marmor. As the attorney fee clause states, it is the "substantially prevailing party" who is entitled to his or her fees. Consequently, if this Court agrees that there was no term being enforced by Mr. Marmor, then this Court must also award attorney fees against the Respondent for her use of the decree against Mr. Marmor.

CONCLUSION

As the Respondent correctly points out, Mr. Marmor's purpose in bringing this action was to get his name off the title to the Scops Owl property. However, it is irrelevant whether the purpose of the parties' divorce decree coincides with Mr. Marmor's purpose in bringing the underlying action. In the end, the Respondent must show that Mr. Marmor was enforcing a specific term in the decree. Because there is no term covering the disposition of the property outside 180 days, Mr. Marmor should not be liable for the Respondent's fees.

Furthermore, as the plain text of I.R.C.P. 54 states, it is the entry of a document entitled "judgment" that triggers the running of the 14-day limit, and fees are waived if not submitted within that limit. Because the Respondent failed to submit her fees within 14 days after entry of the judgment on April 25, she has waived her right to those fees.

As this appeal necessarily involves the enforcement of the attorney fee clause of the divorce decree, it is the substantially prevailing party that should be awarded their fees on appeal. Mr. Marmor respectfully requests that this Court reverse the ruling of the District Court, finding that Mr. Marmor was not enforcing any term in the decree. In the alternative, Mr. Marmor respectfully requests that many of the fees and costs listed in the Respondent's June 6 memorandum be disallowed as untimely with both parties bearing their costs and fees.

Dated: February 6, 2014

Respectfully Submitted,

By: _____

AARON J. TRIBBLE

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2014, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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